RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
JUL 21 1999
CLERK

No. 98-8770

IN THE
SUPREME COURT OF THE UNITED STATES
March Term, 1999

JAMES M. FLIPPO,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

On Petition for Certiorari to the
Supreme Court of Appeals of West Virginia

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether consent to a warrantless search of an unlocked briefcase may be implied where the owner of the briefcase had summoned the authorities seeking their help, had reported that an unknown masked assailant entered his rented cabin and killed his wife in the course of a probable robbery, had directed authorities to the cabin where the body and briefcase were found in close proximity and had cooperated in their investigation, but who had not expressly consented to any search and who was not present when the briefcase was opened.

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The State of West Virginia, by its Attorney General, respectfully suggests that there is no fundamental conflict between the decision below and Mincey v. Arizona, 437 U.S. 385 (1978), and that the Petition for Certiorari should therefore be denied. Unlike Mincey, the facts below strongly suggest that petitioner impliedly consented to the search he complains of here, though no court has yet expressly so ruled. In addition, the photographs thereby obtained (attached hereto) were not inflammatory, were cumulative of other unchallenged evidence on the same issue of fact, and were consequently harmless beyond a reasonable doubt. Either rationale, neither of which conflicts with Mincey, could be the basis of the result below.

I.

STATEMENT OF THE CASE

At 2:11 a.m. on Tuesday morning, April 30, 1996, the Fayette County 911 operator received a call from a pay phone at Babcock State Park (hereafter "Babcock"), an isolated, rustic, park in rural Fayette County, West Virginia. The caller, Reverend Flippo (petitioner herein), reported that he and his wife had been awakened and beaten in their rented guest-cabin by an intruder, that his wife was severely injured, that he was also injured, and that he needed help.[1] Unfortunately, due to Babcock's remote

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[1]Excerpts from a transcript of the recorded call demonstrate why Reverend Flippo was regarded by the local Sheriff's Office as a victim seeking assistance:

> 911 OPERATOR: May I help you?
> CALLER: I need help bad.
> 911 OPERATOR: What's wrong?
> CALLER: I'm hurt bad and wife's hurt bad.
> 911 OPERATOR: Did you wreck?
> CALLER: No. I'm in my cabin and somebody hurt me.
> 911 OPERATOR: Somebody hurt you in your cabin?
> CALLER: Yes. And my wife won't wake up and I don't know what to do.
>
> • • •
>
> 911 OPERATOR: I need to know exactly how did you get hurt, honey? I need you to calm down and tell me this.
> CALLER: He hit me with a log.
>
> • • •
>
> CALLER: I think they cut me, too.
>
> • • •
>
> CALLER: I woke up -- no. I woke up, and my wife wouldn't wake up. They hit her, too.
>
> • • •
>
> 911 OPERATOR: We're dispatching the police and I've got an ambulance enroute. Okay?
> CALLER: Okay. I'll watch for them.
>
> • • •
>
> 911 OPERATOR: . . . Okay. Where is your wife at? Do you know exactly where she's at?
> MR. FLIPPO: She's at my cabin.

(continued...)

location, it took 20 to 25 minutes for the first law enforcement officer, a Deputy Sheriff, to arrive and even longer for the ambulance. (T. 549, 561.)[2] Reverend Flippo told the 911 Operator, and soon after told deputies, the details of an assault and apparent robbery just visited upon he and his wife while sleeping at the remote cabin.

Flippo said he awoke to discover a masked man crouched near their bed. He tried to awaken his wife to run, but the intruder hit him with a fire log, knocking him unconscious. When he regained consciousness, the masked man was cutting on his thighs with a knife and threatening to castrate him. The intruder again knocked Flippo

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[1](...continued)
911 OPERATOR: Okay. What cabin are you in? Do you know?
MR. FLIPPO: 13. 13. I'm at the -- I'm at the office. I'm at the office.
911 OPERATOR: Okay. You're at the office. But is your wife in Cabin 13?
MR. FLIPPO: Yes.

• • •

MR. FLIPPO: Is somebody coming? Is somebody coming?
911 OPERATOR: Yes, honey, they're coming.

• • •

MR. FLIPPO: Is somebody coming to help me?
911 OPERATOR: Yes, honey. I've got -- I've got two ambulances coming and I've got a police officer coming. Okay?
MR. FLIPPO: Okay.

• • •

911 OPERATOR: Okay. What about the guys that hit you? Have they already left?
MR. FLIPPO: I never saw them.
911 OPERATOR: You never saw them?
MR. FLIPPO: Somebody hit me with a log.

• • •

MR. FLIPPO: I think I saw a knife.
911 OPERATOR: You saw a knife?
MR. FLIPPO: I saw a knife somewhere. I don't have a knife, but I saw a knife somewhere.

(T. 520; State's Exh. 56.)

[2]References to pages of the trial transcript are preceded by a "T.," to the suppression hearing transcript by "S.H." and to other documents of record by "R."

out. Upon awakening, Flippo found his unconscious wife on the floor, her head covered with blood. Being unable to locate his cell phone or his Cadillac, Reverend Flippo ran in his bloodied undershorts to the pay phone outside the park office. (State's Exhs. 1, 56.)

Reverend Flippo related the aforesaid facts to Deputy Bryant (the first officer to arrive), and directed him to the cabin. (T. 553-54.) Deputy Bryant used his radio to alert other officers to keep an eye out for Flippo's missing green Cadillac. (Id.) An unknown red Camaro convertible was inexplicably parked at the cabin, suggesting that the intruder, or others, might be inside or nearby. (T. 564.) Leaving Flippo in his patrol car, Deputy Bryant descended the steps to the cabin, cautiously examined it from outside, and then entered through the already open front door. He found Mrs. Flippo's body adjacent to the bed on the floor of the main room.[3] (T. 558-561.) As Deputy Bryant returned to his vehicle, he encountered Flippo descending the stairs, asking, "Did she wake up?" The Deputy responded, "No," and took Mr. Flippo back to the cruiser as paramedics arrived on the scene. (T. 561.)

Using his radio, Deputy Bryant had another cruiser seal off the lane heading to the cabin, and dispatched the park superintendent and his assistant to "check the other cabins in the area, to see if any forceful entry had been made, and to check on the health and welfare of any other guests that might be around." (T. 563.) Deputy

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[3]The main room of the cabin included the bed, the table on which the briefcase lay, chairs, and a fireplace.

Bryant had the paramedics check Mr. Flippo's condition and take him to the hospital for examination of his injuries. (Id.)

Sheriff's Detective Kessler proceeded to the hospital in Oak Hill (approximately 25 minutes from the crime scene) to interview Reverend Flippo, while Detective Burke went directly to Babcock to "process the crime scene." (S.H. 20, 130.) The deputy who customarily took photographs divided his time, going first to the hospital to photograph the Reverend's injuries, and then proceeding to the cabin to take a photographic inventory of the undisturbed crime scene. (S.H. 129-130.) Detective Burke took control of the investigation at the cabin, first searching the perimeter for signs of footprints or a forced entry (finding none) and, after the photographer arrived, entering the cabin at 5:32 a.m. (S.H. 130, 146.)

Once inside, Detective Burke supervised the photography of the scene and participated in the collection of blood swabs, fingerprints, splattered brain-matter and other evidence in plain view (including a bloody fire-log, kitchen-knife, bloodied bed-clothes, etc.). This process continued until 9:43 p.m., at which time the cabin was locked and returned to the control of Babcock State Park.

The numerous crime-scene photographs taken that day included a closed briefcase on a picnic-style table just inside the door of the main room and a later photograph of the open briefcase and its contents. (T. 933, 1022.) The record does not reveal when the briefcase was opened. All items of evidentiary value, and all property of the Flippo's (including the briefcase and its contents) were taken to the Sheriff's Office "for security." (T. 755, 1218.) A "Property Receipt" contained an

inventory of all items seized, whether as evidence or for safe-keeping. (T. 1023, 1217-18; State's Exh. No. 7.)

At trial, Detective Burke indicated that he "inventoried the briefcase." (T. 1023.) At the pre-trial suppression hearing, he testified that the briefcase contained a film processing envelope indicating that the enclosed photos had been processed for Reverend Flippo the preceding day (April 29th) and that he consequently "seized the complete briefcase and these photos in particular because of, Number 1, it depicts photos of a person who was unknown to us at that time, and we wanted to identify the person in the photos because we were investigating a homicide and was looking for potential witnesses." (S.H. 132.)

While Detective Burke was processing the crime scene, Detective Kessler was interviewing Flippo, first at the hospital, and then at the Sheriff's Office. Though Flippo remained cooperative throughout, internal inconsistencies in his assertions prompted Detective Kessler to suggest to Reverend Flippo, at 10:06 a.m., that the discrepancies were sufficient to make him a suspect and he was informed of his Miranda rights. When asked if he would submit to a voice stress analysis test, Reverend Flippo requested an attorney and no further interviewing took place. (S.H. 45.) However, he was still not placed in custody or under arrest, and left with his attorney at approximately 2:00 p.m. (S.H. 47-50.) The trial court found that Reverend Flippo was not a suspect until, at the earliest, 10:06 a.m. (Petitioner's Appendix A at pp. 1-2.) At a pretrial evidentiary suppression hearing, defense counsel sought to suppress all information obtained from Reverend Flippo during Detective

Kessler's non-custodial interviews, and to suppress the photographs of Joel Boggess found inside the briefcase. The motion was denied. (Petitioner's Appendix A.)

The State's case at trial lasted over a week, and consisted of 27 witnesses and over 100 exhibits, including ten photographs found in the briefcase.[4] It was a circumstantial case built largely upon inconsistencies between Reverend Flippo's statements and the physical evidence. For instance, the "unknown" red Camaro found outside the cabin actually belonged to Joel Boggess, who explained that he had exchanged cars with Reverend Flippo the day before the homicide. (T. 1539-1542.) Indeed, Reverend Flippo's "missing" Cadillac was in Boggess's driveway on the morning of the homicide, and remnants of the "missing" cell-phone were found in the cabin's fireplace. (T. 690.) No sign of forced entry was found at the cabin, nor any unexplained fingerprints or footprints either outside or inside the cabin (it was raining at the time). Perhaps the most damaging evidence was the testimony of a forensic pathologist that the minor injuries suffered by Flippo during the alleged attack appeared to be self-inflicted. (T. 1617.)

Though Flippo did not testify at trial, some of the exculpatory assertions in his investigatory interviews were "impeached" by State's witnesses. Flippo's explanation to the police that he had left the door unlocked was attacked by the victim's sister, who testified that Mrs. Flippo was very concerned about security and always locked doors. (T. 1386.) Contrary to Flippo's statement to an acquaintance that the decision

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[4]Photocopies of the admitted photographs are appended hereto. No other items taken from the cabin were the subject of a suppression motion.

to spend the night at Babcock was spontaneous (T. 1383-1384), he had actually made a reservation two days before, specifically requesting an "isolated" cabin. (T. 461-469, 485.) His comments that he had never before been to Babcock (Tr. 472, 481) were contradicted by Boggess, who testified they had been there at least twice before, the last time being the same day that Flippo reserved cabin 13 after Boggess had shown it to him. (T. 461-469, 485, 1523-1529.)

Evidence of possible motives was also introduced. Witnesses testified that Reverend Flippo was a compulsive spender and consequently his wife had limited his access to the family's income and bank accounts. (T. 1324, 1366.) They had an $80,000 account that required both of their signatures for any withdrawals. (T. 1330.) In addition, the Flippo's had recently obtained a life insurance policy on Mrs. Flippo in the amount of $100,000 naming her husband as the beneficiary. (T. 798.) Five days after his arrest, Flippo commented to a correctional officer that he was financially "better off" following his wife's death "than he had ever been." (T. 1339.)

There was testimony from three witnesses that Mrs. Flippo was displeased with her husband's relationship with Joel Boggess. (T. 823, 1298-99, 1325.) One such witness testified that Flippo said that his wife knew he was "sick of her" and "would leave her" if she interfered with Flippo's intention to purchase land jointly with Mr. Boggess. (T. 1324.) A letter from Flippo to his wife, found at the scene, complained bitterly of her attitude towards Boggess. (State's Exh. 10.) Joel Boggess testified for the State as a hostile witness, denying that his friendship with the Reverend had caused any friction with Mrs. Flippo, whom he had considered a good friend. Boggess

claimed that some of the pictures of him found in the briefcase were taken without his knowledge following his private baptism by Reverend Flippo in a creek at Babcock two days prior to the killing. (T. 1527.) He testified that he and the Reverend had taken other trips together during which they had shared the same bed, but that there was no sexual relationship. (T. 1553.)

About a month prior to the homicide Reverend Flippo began reporting to police that a "stalker" was making strange phone calls and sending threatening notes, including one that Reverend Flippo found on his refrigerator following a reported "break-in" of his parsonage. (T. 1265-1270.) Flippo was unable to name a suspect, however, and the "break-in" looked staged to the officer who investigated it. (T. 1266.)

After finding him guilty of first degree murder, the jury received additional evidence related solely to sentencing to determine whether the Defendant should receive "mercy," making him eligible for parole after serving 15 years of his life sentence. The additional evidence established that Reverend Flippo had improperly placed Boggess on his church's health insurance policy (T. 1964-65), had taken more than $15,000 from a fund created for the benefit of a child needing a liver transplant, (T. 1953-54) and had apparently diverted other church funds as well. (T. 1961-63.) The jury declined to grant mercy, so Flippo was sentenced to life in prison with no possibility of parole.

II.

REASONS FOR DENYING THE WRIT

A. West Virginia Follows *Mincey v. Arizona*.

In Mincey v. Arizona, 437 U.S. 385 (1978), a narcotics raid on petitioner's apartment resulted in an exchange of gunfire inside the apartment, severely wounding Mincey and killing an undercover officer. Shortly thereafter, homicide detectives conducted an exhaustive four-day warrantless search of the apartment, opening dresser drawers, ripping up carpets, and seizing 200 to 300 objects, which were used at trial to convict Mincey of murder and narcotics offenses. The Arizona Supreme Court held that the search was permissible under a "murder scene exception" recognized in its earlier rulings. This Court reversed:

> In sum, we hold that the "murder scene exception" created by the Arizona Supreme Court is inconsistent with the Fourth and Fourteenth Amendments -- that the warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there.

437 U.S. at 395. This Court remanded the case to the Arizona Supreme Court to determine to what extent exigent circumstances could justify any of the items seized. 437 U.S. at 395 n.9.

Unlike Arizona and several other states, West Virginia has never recognized a "murder scene exception." It has always followed federal precedent requiring that nonconsensual searches of residences, including motel rooms, be based upon warrants issued upon probable cause, "'subject only to a few well-delineated exceptions'." State v. Buzzard, 194 W. Va. 544, 549, 461 S.E.2d 50, 55 (1995), quoting and

following Katz v. United States, 389 U.S. 347, 357 (1967). Indeed, in State v. Cook, 175 W. Va. 185, 332 S.E.2d 147 (1985), Mincey was specifically relied upon in reversing a murder conviction tainted by incriminating evidence found in the suspect's motel room:

> [T]he instant case bears resemblance to the circumstances involved in Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), where arresting officers secured the scene of a homicide until detectives arrived ten minutes later to conduct a search that lasted four days. The Court, refusing to recognize a "murder scene exception" to the fourth amendment, stated that:
>
> > There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained.
>
> 437 U.S. at 394, 98 S. Ct. at 2414, 57 L. Ed. 2d at 301. Similarly, in the present case, there was no excuse for the failure to obtain a warrant prior to the search of the motel room by the second group of officers after the premises had been secured.

175 W. Va. at 193, 332 S.E.2d at 155.[5] Thus, contrary to Petitioner's claims, West Virginia is not a renegade State that chooses to ignore Mincey.

In this case, most of the testimony and argument on Defendant's Motion to Suppress was oriented towards establishing the earliest point at which the police regarded Reverend Flippo as a suspect rather than a victim. This was important to

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[5] See also State v. McNeal, 162 W. Va. 550, 251 S.E.2d 484 (1978), reversing a conviction in which "five police officers descended upon a private residence, kicked the door down, entered and seized the defendant . . . , searched the house and seized a paring knife, ..." 162 W. Va. at 556, 251 S.E.2d at 488. The court relied upon the recently decided Mincey for the proposition that "the police must obtain an arrest warrant before entering a home to seize a person." Id.

Flippo's efforts to suppress the interviews conducted by Detective Kessler, which were not preceded by Miranda warnings. All officers testified that Reverend Flippo was regarded solely as a cooperative victim for many hours after the crime occurred, as recited in the trial court's order.[6] This evidence was also tangentially relevant to the Fourth Amendment issue, as the police perception that Flippo was an injured victim was undoubtedly a factor in their failure to obtain a warrant to search the cabin. "One can hardly expect the police to get a search warrant for a house or building when the owner is obviously cooperative and gives every appearance of being the victim, rather than the perpetrator, of a crime." Steigler v. State, 277 A.2d 662, 667 (Del. 1971).

In their briefs to the trial court, both the prosecutor and defense counsel relied on Mincey v. Arizona, the State citing it for its dicta that police may "conduct an immediate investigation [of a crime scene] to preserve evidence from intentional or accidental destruction." (R. 56.) (Unlike the situation in Mincey, where the perpetrator was known and hospitalized, Flippo's assailant remained at large and was presumably fleeing and hiding his tracks.) The State's brief also relied on the "plain view" doctrine (pointing out that the briefcase was unlocked) and characterized the police activity at the scene as a "crime scene search and inventory." (R. 57.)

Although "consent" was not argued, the facts recited in the State's brief and the trial court's Order stressed the police-perception that Reverend Flippo was a

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[6]See Petitioner's Appendix A, at pp. 1-2. The Order does not disclose that Flippo left the Fayette County Sheriff's Department at 2:00 p.m. and was neither charged nor arrested until May 3, 1996, three days after the crime occurred. (S.H. 50; R. 40-45.)

cooperating victim.[7] Unlike the State's brief, the trial court's Order makes no mention of exigent circumstances, plain view, or inventory. It is the trial court's terse ruling on the Fourth Amendment issue which Petitioner capitalizes upon in characterizing West Virginia as a renegade State which "explicitly" refuses to follow Mincey v. Arizona:

> The Court also concludes that investigating officers, having secured, for investigative purposes, the homicide crime scene, were clearly within the law to conduct a thorough investigation and examination of anything and everything found within the crime scene area. The examination of briefcase found on the table near the body of a homicide victim in this case is clearly something an investigating officer could lawfully examine.

(Petitioner's Appendix A at p. 3.) Though the quoted statement appears inconsistent with Mincey absent an invocation of plain view, exigent circumstances, or consent, it is certainly not an attempt to "explicitly" overrule a decision of the United States Supreme Court, as Petitioner repeatedly suggests. Rather, it is either an unreasoned conclusory statement or an incomplete disclosure of the trial court's reasoning.[8]

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[7]Detective Kessler obtained a warrant to search Joel Boggess's car while the cabin search was in progress (T. 627-628) and also secured a warrant to allow a forensic pathologist to examine Reverend Flippo's injuries two days later. (T. 64-71.) (It was apparently this examination that led to the decision to charge and arrest Flippo the next day.) Clearly, if the deputies thought Reverend Flippo objected to their search of the cabin, they would have obtained a warrant for the cabin as well as the car.

[8]The trial court's statement that the officers were "within the law" is unexplained, but was presumptively based on established legal principles rather than rebellion against Mincey. Petitioner credibly argues that the State's theories of exigent circumstances, plain view, and inventory each had their own difficulties in light of the testimony at the suppression hearing, but this does not foreclose the possibility that the trial court's ruling was nonetheless premised thereon.

Reverend Flippo's Petition for Appeal was "refused" by the West Virginia Supreme Court of Appeals, meaning that it declined to exercise appellate jurisdiction. In West Virginia, as in Virginia, "there is no appeal as of right from a criminal conviction." Jackson v. Virginia, 443 U.S. 307, 311 n.4. (1979). Such a refusal is not a decision on the merits and does not preclude full consideration of all constitutional issues raised in any State post-conviction proceeding. Smith v. Hedrick, 181 W. Va. 394, 382 S.E.2d 588 (1989). However, the court heard an oral presentation of the petition and had the entire record before it.

Under West Virginia law, a "lower court's judgment may be affirmed when it appears that such judgment is correct on any legal ground disclosed by the record, *regardless of the ground, reason or theory assigned by the lower court as the basis for the judgment*." Syl. pt. 3, Barnett v. Wolfolk, 149 W. Va. 246, 140 S.E.2d 466 (1965) (emphasis supplied). Consequently, the refusal to accept Flippo's appeal could be based on a determination that the pictures were harmless-error, or that the search was justified by legal principles not articulated in the trial court's ruling, including consent. Consequently, neither the decision of the circuit court nor of the West Virginia Supreme Court can be construed as a "declaration that West Virginia will no longer follow Mincey v. Arizona, 437 U.S. 385 (1978)." (Petition at p. 4.)

B. The Decision Below Is Not Inconsistent With *Mincey v. Arizona*.

The most obvious fact distinguishing this case from Mincey is that it was the Defendant, Reverend Flippo, who summoned authorities to aid him, and who directed them to the scene of the homicide. Moreover, by claiming that his wife was killed by a third party, that he was injured in the same attack, that his car and cell-phone were missing, and that he had been the subject of stalking threats, he was clearly inviting the police to use all means at their disposal to identify and apprehend the unknown perpetrator. In such circumstances, police could not be expected to obtain a warrant to conduct an investigation at the complainant's dwelling or to open a briefcase to determine if it had been ransacked in the apparent robbery, or contained items with the intruders' fingerprints or items disclosing a possible motive for the assault.

In numerous state court decisions, similar circumstances have been held to constitute an implied consent to the search of the defendant's dwelling and its contents for all purposes associated with investigating the reported homicide. Typical of these is Brown v. State of Texas, 856 S.W.2d 177 (Tex. Crim. App. 1993), which is highly analogous to this case in many respects, particularly in that a closed container was searched without defendant's knowledge. As in this case, "appellant called the police . . . with news that he had just found his wife dead in the garage."

> Appellant asked the police dispatcher to send a squad car and an ambulance to the crime scene which also was his home. He also volunteered the opinion that someone had robbed his wife because her purse was missing. Appellant appeared very upset, and an officer soon escorted him to a patrol unit to calm down and stay warm until the

> investigators could speak with him. Appellant proceeded to discuss his activities earlier that day.

856 S.W.2d at 179. After securing the premises and searching the outside of the home for clues, a detective entered the house through the garage and noted blood splatters at the entrance of a bedroom. In another bedroom, he found a purse, opened it, and found a cash register receipt which was later used to contradict appellant's assertion that he had remained home all evening. The denial of defendant's motion to suppress the receipt was the subject of an appeal:

> The detective's search of the home was without warrant or the expressed consent of appellant. In fact, no officers ever approached appellant about consent to search. He was in a police car and appeared to be grieving over the death of his wife.

856 S.W.2d at 179. After cataloguing the several state court decisions distinguishing such circumstances from Mincey v. Arizona, the Texas Court of Criminal Appeals joined their ranks as follows:

> We therefore hold that when a crime is reported to the police by an individual who owns or controls the premises to which the police are summoned, and that individual either states or suggests that it was committed by a third person, he or she implicitly consents to a search of the premises reasonably related to the routine investigation of the offense and the identification of the perpetrator. As long as the individual is not a suspect in the case or does nothing to revoke his consent, the police may search the premises for these purposes, and evidence obtained thereby is admissible.

856 S.W.2d at 182. The Court of Criminal Appeals of Texas relied heavily on State v. Koedatich, 112 N.J. 225, 548 A.2d 939 (1988), quoting it as follows:

> Moreover, courts in other states have found implied voluntary consent where, as in the instant case, the defendant has initiated police contact and has adopted a "cooperative posture in the mistaken belief that he

> could thereby divert or prevent police suspicion of him." *W. LaFave, Search & Seizure; A Treatise on the Fourth Amendment § 8.2(g), at 204 (2d Ed. 1987)*; see also *Steigler v. State*, 277 A.2d 662, 667 (Del. 1971) (actions of fully cooperative defendant amounted to implied consent to search and seizure: "One can hardly expect the police to get a search warrant for a house or building when the owner is obviously cooperative and gives every appearance of being the victim, rather than the perpetrator, of a crime") ; *State v. Fredette*, 411 A.2d 65, 70 (Me. 1979) (defendant initiated police presence through urgent calls to police; invited them to enter home; and continually cooperated with police as they searched home). . . .

856 S.W.2d at 181-82.

Brown notes that this Court, in 1984, clearly implied that circumstances such as those at issue here could support a finding of consent. Thompson v. Louisiana, 469 U.S. 17 (1984). In Thompson, the Louisiana Supreme Court had not addressed consent, instead relying on a general concept of "diminished expectation of privacy" in one's dwelling after a call to authorities for assistance. Though reversing the Louisiana Supreme Court's theory of diminished expectation of privacy, this Court nonetheless remanded for, *inter alia*, a consideration of consent even though "both homicide investigators explicitly testified that they had received no consent to search." 469 U.S. at 23. Since there was no express consent, this Court could only have been referring to implied consent when it said, "[a]ny claim of valid consent in this case would have to be measured against the standards of United States v. Matlock, 415 U.S. 164 (1974), and Schneckloth v. Bustamonte, 412 U.S. 218 (1973)." Id.[9]

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[9]In Thompson, the cause of death and the identity of the perpetrator were known *before* the search was conducted and thus, unlike this case, any implied consent could not be construed to be for those purposes. Post-Thompson decisions in state courts applying the (continued...)

Applying the consent standards of Matlock and Schneckloth, several state appellate courts have, as in Brown v. Texas, supra, found broad consent to search to be implied from a call for assistance accompanied by allegations of an intruder.[10] Though some decisions of lower state courts appear more circumspect regarding the scope and duration of any such implied consent,[11] there is no conflict among the states' highest courts, and the conflicts among lower courts may turn on factual differences.

With respect to Reverend Flippo, there has been no express judicial determination that the record would support a finding of implied consent to search the cabin, and no express judicial determination as to whether the interior of the briefcase was within the scope of such consent. Admittedly, the record does not reveal

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[9](...continued)
"implied consent" theory advocated here are collected and discussed in W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 6.5(e), at 383-385 (3d Ed. 1996).

[10]See State v. Brady, 585 So. 2d 524 (La. 1991) (warrantless search of closet was reasonable after defendant had requested neighbor to call police to report a stabbing, defendant disclaimed any culpability, and manifested interest in officer's investigation); State v. Koedatich, supra; Commonwealth v. Beldotti, 409 Mass. 553, 567 N.E.2d 1219 (1991) (consent implied from defendant's call to the police, telling police where the body was, expression of deep emotional distress at the victim's death, and cooperative attitude); State v. Fleischman, 157 Ariz. 11, 754 P.2d 340, 343-44 (Ariz. App. 1988) (by reporting to the police that his wife had been killed, the defendant gave complied consent to the initial entry and "a search of the premises reasonably related to the routine investigation of the offense and the identification of the perpetrator"); State v. Butler, 676 S.W.2d 809 (Mo. 1984) (injured's husband's call to the police, combined with unlocking the front door just before he died to allow them entry, constituted sufficient consent for police to search the wife's upstairs bedroom, where evidence incriminating her was discovered).

[11]See People v. Annerino, 97 Ill. App. 3d 240, 422 N.E.2d 923 (1981); State v. Jolley, 68 N.C. App. 3d, 314 S.E.2d 134 (1984); People v. Timms, 179 Cal. App. 3d 86, 224 Cal. Rptr. 434 (1986).

whether the briefcase was opened before or after Flippo became a "suspect," a factor likely to be important to the duration of any consent implied from his earlier behavior.

Development of additional facts could occur in a post-conviction habeas corpus proceeding pursuant to W. Va. Code § 53-4A-1, et seq. As previously noted, the State's highest court has held that its refusal of a petition for appeal does not foreclose habeas corpus review of issues raised. Smith v. Hedrick, 181 W. Va. 394, 382 S.E.2d 588 (1989). West Virginia's unusually broad post-conviction statutory remedy has been described by the United States Court of Appeals for the Fourth Circuit as follows:

> This amendment [The Post-Conviction Habeas Corpus Act] provides that West Virginia prisoners may now raise -federal constitutional issues in the state courts, *W. Va. Code § 53-4A-1(a) (1967 amendment)*; and that they must be given a full and fair evidentiary hearing, *W. Va. Code § 53-4A-7(a) (1967 amendment)*. The amendment further provides that the court hearing the matter must make findings of fact, state conclusions of law and the grounds, state or federal, on which resolution of the prisoner's claim is based. *W. Va. Code § 53-4A-7(c) (1967 amendment)*. This 1967 amendment appears to afford adequate postconviction remedies to West Virginia prisoners.

Sheftic v. Bowles, 377 F.2d 423, 426 n.9 (4th Cir. 1967). A post-conviction judgment is appealable to the West Virginia Supreme Court, which may "refuse" the petition for appeal or grant it and consider the case on its merits. W. Va. Code § 53-4A-9. Any such decision would, of course, be subject to certiorari review by this Court.[12]

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[12]The State does not make this suggestion merely to "postpone the inevitable," but rather because useful information would likely be developed at such a hearing. Detective (continued...)

The most significant limitation on Flippo's ability to obtain post-conviction relief in State court is a statutory provision precluding the relitigation of claims which "have been previously and finally adjudicated." W. Va. Code § 53-4A-1(b). Petitioner's Fourth Amendment claim in this case fits the statutory definition and thus would be precluded unless the earlier decision (the circuit court decision at issue here) "upon the merits is clearly wrong." (Id.)

However, the circuit courts of West Virginia must dispose of habeas corpus petitions filed there -- they have no discretion to refuse to exercise jurisdiction -- and must make findings of fact and conclusion of law sufficient to justify any disposition. W. Va. Code § 53-4A-7; Sheftic v. Boles, supra. Consequently, in order to deny relief to Reverend Flippo on the grounds that the Fourth Amendment issue has been "previously and finally adjudicated," the circuit court must necessarily find that the trial court's decision was not "clearly wrong." Otherwise, the issue will have to be determined on its merits after an "omnibus" hearing. Gibson v. Dale, 173 W. Va. 681, 319 S.E.2d 806 (1984). Petitioner would be entitled at such a hearing to counsel and a full evidentiary hearing. Gibson; W. Va. Code §§ 53-4A-4(a) and 53-4A-7(a).

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[12](...continued)
Burke's detailed investigative notes, from which he was cross-examined by defense counsel (T. 1217-18), indicate that Flippo's medicine was retrieved by Burke from the briefcase at noon at the request of Detective Kessler, who was with Flippo at the Sheriff's Office. This information, however, *is not in the record below*. Nor do said notes indicate whether the briefcase had already been opened at that time. All that the current record reveals is that the briefcase remained closed at 5:30 a.m. and was opened before 7:44 p.m., when its contents were photographed.

C. Admission Of The Photographs Was Harmless Error.

Unfortunately, the "consent" theory advocated here was not expressly relied upon below, a factor militating in favor of a grant of certiorari simply to insure that this federal issue is expressly resolved.[13] However, if certiorari were granted, the State would have a strong argument that the admission of the photographs was harmless in any event. The only disputed issue to which they were relevant was the victim's alleged displeasure with Flippo's relationship with Mr. Boggess, which was only one of several circumstances which could have motivated Flippo to kill his wife.[14] However, the relationship with Mr. Boggess, and Mrs. Flippo's negative attitude, were fully developed independently of the photographs by the testimony of three witnesses who had nothing to do with the pictures. (T. 823, 1298-99, 1325.) In addition, a letter written by Flippo to his wife was admitted in evidence, in which Flippo's own words disclosed the motive far better than the pictures he took:

> I wish you would let me be happy, but you won't. You are determined to make me feel sad. You make life miserable over me talking on the phone. I don't understand you.
>
> Why can't I have a friend? Why do you want to own me like a car? Why are you trying to force me to have a friendship with Joel or anyone else in secret? I will not be forced to lie or have a friendship in secret.

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[13]Stone v. Powell, 428 U.S. 465 (1976), generally precludes federal collateral review of Fourth Amendment issues, thus leaving certiorari as petitioner's sole access to a federal forum.

[14]The pictures also corroborated the appearance of Boggess's red Camaro and the presence of Flippo and Boggess at Babcock the weekend prior to the homicide, but these facts were uncontested at trial and proven independently by other photos of the vehicle and by Boggess's testimony.

> The competition is in your mind. You created it. I wish you cared about my interests.

(State's Exh. 10.) The pictures were consequently cumulative evidence on only one of several possible motives. The photographs themselves are appended hereto, and are not inherently inflammatory.

The traditional "harmless beyond a reasonable doubt" standard is applied to determine whether errors in the application of the Fourth Amendment exclusionary rule require reversal. Chambers v. Maroney, 399 U.S. 43, 53 (1970). A major factor in determining that erroneously admitted evidence is harmless is its cumulative nature, particularly where, as where, defendant's own words confirm the truth of the fact in issue. Thus, in Harrington v. California, 395 U.S. 250 (1969), the erroneously admitted confessions of two codefendants was deemed harmless when the principal fact which they were intended to prove (defendant's presence at the scene of the crime) was independently proven by other evidence, including the live testimony of a third codefendant and defendant's own pretrial statements. Id. at 253-254. That is likewise the case here.

The jury was instructed that "you must not permit yourself to be influenced by sympathy, passion, prejudice or public sentiment for or against this defendant," and that "this defendant is not trial for any act or conduct or crimes not charged in the indictment." (R. 511-521.) The record contains nothing to suggest that the jury wavered from these instructions, as their verdict was compelled by the obviously staged crime, Flippo's self-inflicted injuries, his false reports that his Cadillac and cell

phone were missing, and the absence of any evidence to support Flippo's assertions of an intruder.

III.

CONCLUSION

Wherefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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